Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

94-123

In re	)	
	)	
First Media Corporation	)	
Petition for Declaratory Ruling re	)	MMB File No. 900418A
Constitutionality of the	)	
Prime Time Access Rule	)	

To: The Commission

COMMENTS OF FIRST MEDIA, L.P.

FIRST MEDIA, L.P.

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SUMMARY

First Media, L.P., the licensee of WCPX-TV, Orlando, Florida, submits that the Prime Time Access Rule ("PTAR") should no longer be enforced because it can no longer be reconciled with the First Amendment.

PTAR, adopted in 1970, prohibits network affiliate television stations in the top 50 markets from broadcasting certain categories of programs during part of prime time. This restriction upon licensees' freedom to choose what they will broadcast has survived constitutional challenge in the past on the ground that spectrum scarcity has justified government regulation of broadcast program content. In 1987, however, the Commission rejected that rationale when it rescinded the Fairness Doctrine, finding that spectrum scarcity has been eliminated by dramatic technological advances since the 1970's.

In light of that finding, and especially given the near universal availability today of cable television with its vast video channel capacity, there remains no First Amendment justification for restraining the programming discretion of television broadcasters. The spectrum scarcity rationale is no longer valid, and PTAR does not pass the test of strict scrutiny to which it must be subjected under general First Amendment principles.

PTAR is constitutionally infirm because it is a content-based restriction on speech that imposes the programming value judgments of the government in limiting the freedom of broadcasters to choose what they will broadcast. Moreover, PTAR discriminates between classes of speakers. The rule could withstand scrutiny only if it served a compelling governmental interest (which it does not) and if its burdens on speech were merely incidental (which they are not).

Because PTAR is no longer a constitutionally permissible exercise of the Commission's power to regulate broadcasting, the rule should be promptly rescinded.

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COMMENTS OF FIRST MEDIA, L.P.

First Media, L.P. ("First Media"), by its counsel, submits the following comments relating to the "Petition for Declaratory Ruling" filed April 18, 1990, by First Media Corporation on the constitutionality of the Prime Time Access Rule ("PTAR").[1/] These comments update and supplement the arguments made by First Media in its petition and associated pleadings.

[1/] First Media, L.P. is the current licensee of WCPX-TV and the successor-in-interest to First Media Corporation, which filed the Petition for Declaratory ruling. First Media Corporation is the sole general partner of First Media, L.P. The term "First Media" as used here refers to both entities.

A. Introduction

1. For the reasons stated below, the Prime Time Access Rule is no longer a constitutionally permissible exercise of the Commission's power to regulate broadcasting.

2. PTAR directly prohibits affiliates of ABC, CBS, and NBC in the 50 largest television markets from transmitting certain categories of programs during part of the prime time viewing period.[2/] Specifically, these stations are barred from filling more than three of the four prime time hours with network programs (i.e., programs provided by the network) or off-network programs (i.e., programs formerly on a national network). While exception is made for some favored kinds of network or off-network programs -- namely news, public affairs, documentary, political, children's, certain live sports, and feature film programs -- the rule applies to all other forms of network and off-network programming. As a result, broadcasters subject to the rule suffer a very substantial restriction upon their programming discretion during the heaviest viewing hours of the broadcast day.[3/]

2/ Prime time is defined as 7:00-11:00 p.m. in the Eastern and Pacific time zones and 6:00-10:00 p.m. in the Central and Mountain time zones. 47 C.F.R. §73.658(k).

3/ 60.6% of TV households have TV sets in use from 8:00-11:00 p.m. (all nights), as compared to 22.8% during the 10:00 a.m.-1:00 p.m. daypart (M-F) and 28.0% during the 1:00-4:30 p.m. daypart (M-F). Source: Broadcasting Yearbook 1994, p. C-219 (citing National Audience Demographics Report, August 1993).

3. This restraint on broadcasters' freedom to choose what they broadcast has survived constitutional challenge in years past. However, since the last time the issue was addressed, the constitutional framework has been dramatically altered. In its seminal 1987 Syracuse Peace Council decision rescinding the Fairness Doctrine, the Commission rejected as no longer valid the only basis on which broadcast content regulation has ever been reconciled with the First Amendment -- spectrum scarcity.[4/] In so doing, the Commission asserted its view that broadcasters should now have the same First Amendment protections that apply to the print media.

4. The compelling logic of the Syracuse decision leaves the Prime Time Access Rule (like the Fairness Doctrine) without further constitutional justification.

B. The History of PTAR

5. The Commission adopted the Prime Time Access Rule twenty-four years ago to restrain domination of evening television by the three national networks (ABC, CBS, and NBC) and give independent producers access to evening viewing hours. Report and Order, 23 FCC 2d 382, 384 (1970). That action was prompted by the following "relatively simple" facts: (1) there were only

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4/ Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), affirmed sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

three national television networks; (2) in the top 50 markets there were 224 operating television stations, of which 153 were network affiliates; (3) only 14 of the top 50 markets had at least one independent VHF television station; and (4) control over programming and over access to licensed stations was heavily concentrated in the hands of the three networks. Id. at 385-86. The Commission found that those circumstances combined to stifle independent producers and thereby limit the diversity of programming available to the public. Independent producers, said the Commission, "must have an adequate base of television stations to use [their] product," and access to the top 50 markets "is essential to form such a base." Id. at 386. To open adequate outlets for independently-produced programming, the Commission curtailed the amount of prime time that the network affiliate stations could fill with network-produced programming. "Our objective is to provide opportunity -- now lacking in television -- for the competitive development of alternate sources of television programs...." Id. at 397.

6. The Prime Time Access Rule, therefore, was spawned by a dearth of television stations available to transmit non-network programming to the public. And the constitutional justification of the rule was founded on the same premise. When PTAR was challenged as a direct restraint on speech in contravention of the First Amendment, the Second Circuit upheld the rule on the ground that spectrum scarcity justified restrictions

on broadcast content. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971), citing Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969). Articulating the scarcity rationale in Red Lion, the Supreme Court had stated: "Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." 395 U.S. at 390. The Court characterized this as "enforced sharing of a scarce resource." Id. at 391.

7. The Commission itself embraced that rationale four years later when opponents of PTAR renewed their constitutional objections before the agency. Acknowledging that PTAR was a "restraint on licensees," the Commission declared that "the inherent limitations in broadcast spectrum space make necessary restraints -- restricting the speech of some so that others may speak -- not elsewhere appropriate." Second Report and Order, 50 FCC 2d 829, 847 (1975). In the nineteen years that have passed since that pronouncement, neither the Commission nor the courts have revisited PTAR.

C. The Scarcity Rationale Is No Longer Valid

8. In 1987, however, the Commission did thoroughly reevaluate and reject the rationale of spectrum scarcity, on which the constitutionality of PTAR was solely premised. Syracuse Peace Council, supra. Noting "the extraordinary

technological advances that have been made in the electronic media since the 1969 Red Lion decision," the Commission urged that the Red Lion premise be reassessed. 2 FCC Rcd at 5048. With respect to video programming services, the Commission found that since Red Lion was decided in 1969: the number of television stations overall in the country had increased by 57%; the number of UHF stations had increased by 113%; the number of television households receiving five or more over-the-air television signals had increased from 59% (in 1964) to 96%; the number of cable television systems had increased (since 1974) by 111%; the number of cable television subscribers had increased (since 1974) by 345%; the percentage of cable systems able to carry more than 12 channels had increased from 1% to 69% (serving 92% of cable subscribers); the percentage of television households with access to cable had risen to 75%; the number of households actually subscribing to cable (43,000,000) had risen by 47%; and significant contributions to programming diversity were now being made by new electronic technologies that had been unavailable at the time of Red Lion, including low power television, MMDS, video cassette recorders (VCRs), and satellite master antenna systems (SMATV). Id. at 5053. The Commission concluded that these "dramatic changes in the electronic media" have rendered obsolete "First Amendment principles that were developed for another market." Id. at 5054. In short, said the Commission, the concept of scarcity is now "irrelevant" in

analyzing the appropriate First Amendment standard to be applied to the electronic media. Id. at 5055.[5/]

9. Today, seven years after the Commission rejected the scarcity rationale in Syracuse, the facts are even more compelling. There is now a plethora of channels available to program producers for the transmission of video programming to the public:

- There are **1,519** licensed full-power and **1,496** licensed low-power television stations in the United States;[6/]

- In the top 50 markets, there are **453** commercial television stations, an average of **9.1** per market;[7/]

[5/] The courts have not yet addressed this. Although the Court of Appeals affirmed Syracuse, it did so without reaching the Commission's constitutional holding. Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). In 1984, three years before Syracuse, the Supreme Court indicated a willingness to revisit the scarcity rationale upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, 376, n. 11 (1984). Additionally, several Eighth Circuit judges have very recently endorsed the idea that changed circumstances now make it appropriate to reevaluate the concept of spectrum scarcity. See Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1442 n.12 (8th Cir. 1993) (suggesting that "the holding in [Red Lion] may well be reconsidered by the Supreme Court now that broadcast frequencies and channels have become much more available").

[6/] Source: FCC News Release, Jume 7, 1994.

[7/] Source: Television & Cable Factbook, Stations Volume No. 62, 1994 Ed., pp. A-1 - A-2 (for top 50 markets specified by FCC Public Notice, Mimeo No. 33069, May 11, 1993).

• Approximately **4,000,000** residential households in the United States have home satellite dishes for direct reception of programming via satellite;[8/]

• **88.3%** of all households, and **89.5%** of TV households, in the United States have access to cable television;[9/]

• **59,332,200** households, constituting **63.2%** of TV households in the United States, subscribe to cable television;[10/]

• **37.9%** of cable subscribers receive 54 channels or more, **55.7%** receive 30-53 channels, and **2.6%** receive 20-29 channels, making a total of **98.2%** who receive 20 channels or more;[11/]

• The basic cable networks now have a higher combined rating, as measured for all TV households (**7.8**) than do NBC affiliates (**4.9**), CBS affiliates (**5.6**), ABC affiliates (**5.4**), or independents (**3.0**);[12/]

8/ Source: Satellite Broadcasting and Communication Association.

9/ Source: Television & Cable Factbook, Cable & Services Volume No. 62, 1994 Ed., pp. I-21 (Arbitron data), I-70.

10/ Source: A.C. Nielsen Co. data, cited in Cable on Line Data Exchange, February 1994.

11/ Source: Cable & Television Factbook, Services Volume No. 62, 1994 Ed., p. I-69.

12/ Source: A.C. Nielsen Co. data, quoted from the Cable Television Advertising Bureau and found in 1994 Cable TV Factbook, pp. 7 & 24.

• A great variety of program services are now received by 20 million or more subscribers, as reflected by the following subscriber data for basic cable networks (predominant format in parentheses):[13/]

Program Service	Total Subscribers
ESPN (sports)	61,059,000
USA Network (movies, sports)	60,000,000
C-SPAN (public affairs)	59,400,000
Discovery Channel (informational)	58,000,000
Family Channel (variety)	57,019,000
Lifetime (informational)	57,000,000
CNN (news, public affairs)	56,797,000
TBS (movies, sports)	55,200,000
MTV (music video)	54,900,000
TNN (entertainment)	54,500,000
Weather Channel (weather)	53,400,000
Nickelodeon (entertainment)	52,900,000
TNT (entertainment, sports)	50,800,000
Arts & Entertainment (movies)	48,000,000
CNBC (business, talk)	47,700,000
American Movie Classics (movies)	45,000,000
Headline News (news)	44,968,000
Video Hits-1 (music video)	44,200,000
QVC (home shopping)	41,000,000

13/ Source: Television & Cable Factbook, Services Volume No. 62, 1994 Ed., pp. G-70 - G-86.

WGN-TV (movies, sports)	38,100,000
BET (Black-oriented entertainment)	34,000,000
C-SPAN II (public affairs)	27,600,000
Mind Extension U (educational)	23,000,000
Comedy Central (comedy)	22,000,000
HSN (home shopping)	21,000,000
Sportschannel America (sports)	20,000,000

10. As these data demonstrate, the enormous growth of cable television alone has turned spectrum scarcity into channel abundance. The great majority of the American public now has access to cable television, which means instant access not to four or five channels (as in the Red Lion era) but to upwards of fifty channels. Likewise, there are now upwards of fifty, not merely four or five, outlets available for producers of video programming who wish to disseminate programs to the public. To the viewer in his living room, there is no functional difference between transmission over-the-air and transmission by wire cable. Both modes of transmission bring video programs to his screen. The Commission is correct, therefore, to aggregate broadcast channels and cable channels when assessing the diversity of program sources available to the public, as it did when it reexamined the notion of spectrum scarcity in Syracuse.

11. Aggregation of functionally indistinguishable broadcast channels and cable channels produces a far different constitutional analysis from that articulated in Red Lion. The

courts have already held that the scarcity rationale cannot sustain regulation of cable television because cable channel capacity is virtually unlimited. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448-51 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-45 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). If there is no scarcity of channels when only the cable component is considered, there plainly is no scarcity when both the cable and the broadcast components are considered.

12. To be sure, broadcast and cable have heretofore been subjected to different First Amendment standards because broadcast channels are scarce and cable channels are not. However, that distinction is no longer viable if cable channels are deemed equivalent to broadcast channels as sources of video diversity. It is well within the Commission's province and expertise as a regulatory agency to determine that cable channels and broadcast channels are equivalent in that respect, and the Commission so determined in Syracuse. Thus, the Commission has already made the finding that bridges the constitutional gap which once separated broadcasting from cable.[14/]

14/ The Commission noted in Syracuse that its Fairness Doctrine decision did not call into question the constitutionality of "our content-neutral, structural regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n. 56 (1988) (emphasis added). However, PTAR is not a structural regulation and (as discussed below) is not content-
(continued...)

13. The technological sea change recognized by the Commission in Syracuse means that the physically limited broadcast spectrum is no longer the only practical means of audio/video communication to a mass audience. A programmer today does not need access to a broadcast station to reach a mass audience. Cable News Network (CNN) is not broadcast. HBO is not broadcast. ESPN is not broadcast. The Weather Channel is not broadcast. The Disney Channel is not broadcast. C-SPAN is not broadcast. USA Network is not broadcast. MTV is not broadcast. As these and countless other national, regional, and local audio/video programmers have now demonstrated, communication to a mass audience is perfectly feasible without the use of any broadcast spectrum. If programmers can bypass the spectrum altogether, the fact that the spectrum is physically limited no longer has relevance for First Amendment purposes.

14. For that reason, President Bush in 1990 urged that content regulation of broadcast programming is no longer justified by the notion of spectrum scarcity. Explaining his unwillingness to sign the "Children's Television Act of 1990" into law, President Bush said:

> I recognize that the Supreme Court has upheld the application of certain content-based regulations to broadcast licensees, on the theory that the "scarcity

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14/ (...continued)
neutral. Thus, the Commission has never suggested that PTAR is exempt from the Syracuse rationale.

> of broadcast frequencies" makes government involvement inevitable. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Whatever the validity this analysis may have been thought to have some two decades ago, its factual premise has been eroded by the proliferation of new video services that supplement those provided by traditional broadcasters. Accordingly, a constitutional challenge to this legislation may provide the Supreme Court with an occasion to reconsider its decision in Red Lion.[15/]

15. That statement implicitly recognizes that radio and television stations were historically the only means of simultaneous audio/video transmission to a mass audience. In 1969, when Red Lion was decided, broadcasters exclusively controlled what programming was available to the public. Thus, they could act as private gatekeepers simply by controlling access to their facilities. PTAR was designed to prevent the major broadcast networks and their affiliates from exercising such control by denying independent producers access to the airwaves during prime time. Now, more than twenty years later, however, independent producers have access to a wide array of program outlets. As noted above, a program supplier who cannot gain access to a broadcast frequency can transmit programming to mass audiences by other means -- principally by cable, which has no spectrum limitation, but also by low power television stations, MMDS or wireless cable systems, or direct broadcast satellite. Neither broadcast licensees nor the networks are able any longer to act as private gatekeepers.

15/ Statement by the President, October 17, 1990.

16. Therefore, while not everyone with the economic means can hold a television license, anyone with the economic means today can transmit television programming to a mass audience by another technology. Since those who hold broadcast licenses no longer control access, the First Amendment analysis traditionally applied to broadcasters is no longer valid. Broadcasters today no more control video access to mass audiences than print publishers control print access. Just as access to publishing is physically unlimited, so too is access to video transmission. Thus, the Commission correctly determined in Syracuse that the concept of broadcast spectrum scarcity no longer justifies content regulation under the First Amendment. That determination does not rewrite the laws of physics. It merely recognizes that technology has brought fundamental changes to the media marketplace.

17. Some have argued that the Supreme Court in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), reaffirmed the constitutionality of regulations based on spectrum scarcity. That claim fundamentally misreads Metro. The Court did recite that it has historically recognized spectrum scarcity as justification for regulations designed to ensure that the public receives a diversity of views and information. Id. at 566-67. However, the Court did not purport, and has never purported, to make its own independent finding of spectrum scarcity. It has simply recognized the spectrum scarcity finding of Congress and

the Commission, whose province it is to make such factual determinations. The current state of spectrum scarcity (as found by the Commission in Syracuse) was not at issue in Metro. Therefore, Metro cannot be read as resolving, or even addressing, the issue of whether content-based regulation can constitutionally survive the Syracuse findings.

D. PTAR Is an Unconstitutional Abridgement of Broadcasters' Right of Free Speech

18. If PTAR can no longer be justified under a special First Amendment standard for broadcasting because the scarcity rationale no longer applies, it must be judged by First Amendment standards of general applicability.

19. Under the most lenient First Amendment standard, a regulation restricting speech will be sustained only if it furthers an important or substantial governmental interest and imposes only an incidental burden on speech. Quincy Cable TV, Inc. v. FCC, supra, 768 F.2d at 1450-51. See also, Home Box Office, Inc. v. FCC, supra, 567 F.2d at 48. The test is even stricter, however, if the regulation is content-based. Content-based regulations are presumptively invalid. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548-2549 (1992). Thus, a speech restriction that turns on content is subjected to strict scrutiny and is justified only if it is necessary to serve a **compelling** governmental interest and is narrowly drawn to

achieve that end. Burson v. Freeman, 112 S. Ct. 1846, 1851 (1992).

1. PTAR Is Content-Based

20. PTAR is subject to this strict constitutional scrutiny because it imposes a time restriction that turns on program content. The rule exempts programs of a certain subject matter from the prime time restriction, such as news, public affairs, documentary, children's, live sports, and feature film programs. See Section 73.658(k)(1)-(6) of the Commission's Rules. These program categories are defined in PTAR, and the definitions inescapably turn on content.

21. For example, Note 2 to Section 73.658 defines "documentary programs" as programs that are nonfictional and "educational or informational." This requires the Commission to determine whether or not a program is "educational." Likewise, the Commission's definition of "public affairs programs" requires the Commission to determine whether the program "primarily" concerns "local, national, and international public affairs." The movie of George Orwell's "1984" might well qualify as a public affairs program under this definition, since it is quite arguably a "commentary" on "international public affairs." Other topical programs in entertainment format might qualify as commentary on public issues (abortion, affirmative action, AIDS, etc.). Moreover, prime time network schedules

carry many fact-based programs, such as "Rescue 911," which provides information about emergency procedures through the re-enactment and presentation of actual emergency responses to 911 telephone calls, and "Unsolved Mysteries," which often seeks public help in solving actual crimes. Such programs might or might not be deemed to qualify for exemption from PTAR as documentaries or public affairs programs. The point in all of these examples is that the Commission would have to make the determination based solely on the content of the program. Thus, PTAR is unquestionably a content-based regulation.[16/]

22. PTAR's most direct effect is to regulate the time during which a broadcaster may air (or may not air) certain programs. Without a compelling governmental interest, however, that is impermissible. A regulation governing the time, place, or manner of speech may not be based on the content or subject matter of speech. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984); Consolidated Edison v. Public Service Commission, 447 U.S. 530, 536 (1980). Indeed, in Regan the Court held that a regulation was unconstitutional if it permitted the government to decide whether or not the content of a message was "educa-

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16/ It is immaterial that the program content restrictions in PTAR do not operate to favor any particular viewpoint over another. The Supreme Court has made abundantly clear that content-based regulations are constitutionally suspect whether or not they favor any particular viewpoint. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516 (1993); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 112 S. Ct. 501, 509 (1991).

tional" -- the very determination the Commission would have to make under PTAR's exemption for "educational" programs.

23. In sum, PTAR permits licensees to broadcast favored programs throughout prime time but non-favored programs during only a portion of prime time -- the distinction depending solely on the content of the program. The rule thus imposes the programming value judgments of the government in limiting the freedom of broadcasters to choose what they will broadcast. This is clearly impermissible, absent a compelling governmental interest (something the Commission has never claimed, much less shown). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., supra, at 648-49.

2. PTAR Discriminates Between Classes of Speakers

24. PTAR is also constitutionally infirm because it discriminates between classes of speakers. Indeed, the rule is explicitly designed to favor one class of speakers over another. In the favored class are independent program producers; in the disfavored class are the national networks (ABC, CBS, NBC) and the network affiliate stations in the top 50 markets. In order to create access for independent producers during the specified time period, the rule denies access to the networks and circum-

scribes the affiliates' freedom as licensees to choose what they will broadcast in the exercise of their judgment.

25. This discrimination among speakers inherent in PTAR fundamentally offends First Amendment principles. As the Supreme Court has held, "the concept that government may restrict speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). PTAR directly restricts the speech of the networks and their affiliate stations in markets 1-50 in order to enhance the relative voice of independent producers and independent stations in those markets. A rule that prefers some speakers at the expense of others merits the strictest constitutional scrutiny. Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 789 (1988) (direct restriction on protected First Amendment activity will be subjected to "exacting First Amendment scrutiny"). Because PTAR serves no compelling governmental interest, it does not pass that strict test.

26. Moreover, a rule that regulates how a speaker may speak is a direct, not merely an incidental, burden on First Amendment rights. Riley v. National Federation of the Blind of North Carolina, supra, at 789 n.5 (1988). PTAR directly affects speech in two ways: (1) it directly and deliberately precludes networks from airing certain programs in the major markets during peak viewing hours; and (2) it directly and deliberately

forces affiliate stations in those markets to broadcast programs they might otherwise choose not to broadcast. In both purpose and effect these are far more than "incidental" burdens on the First Amendment rights of those so burdened.

E. Conclusion

27. The Commission recognized in Syracuse that a dramatically altered communications landscape calls for reexamination of the constitutional framework of broadcast regulation. The abundance of video channel outlets now available nullifies the scarcity rationale as a justification for continued regulation of broadcast program content. If the Fairness Doctrine is no longer constitutionally enforceable, neither is the Prime Time Access Rule. Continued enforcement of PTAR is fundamentally at odds with the legal principles announced in Syracuse and with basic First Amendment free speech protections. The Commission, therefore, should promptly declare PTAR unconstitutional and rescind the rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joan M. Trepal, certify that on this 14th day of June, 1994, copies of the foregoing "COMMENTS OF FIRST MEDIA, L.P." were delivered or mailed, postage prepaid, to the following:

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